(3)

No. 84-978

IN THE

Supreme Court of the United States

OCTOBER TERM 1984,

EXXON CORPORATION, THE BFGOODRICH COMPANY; UNION CARBIDE CORPORATION; MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Appellants,

v.

ROBERT HUNT, Administrator of the New Jersey Spill Compensation Fund; CLIFFORD GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of the Department of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM

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ARGUMENT

The argument offered by New Jersey in response to appellants' jurisdictional statement faithfully follows the approach of the New Jersey Supreme Court in this case. The State argues that unless "the federal enactment in question clearly and unambiguously forbids a particular type of state action" (N.J. Br. 13), State courts in resolving preemption issues are free to adopt "a pragmatic analysis," which "consider[s] the relationship between state and federal laws as they are interpreted and applied, not merely as they are written" (id. at 18). *See Also id.* at 13: "[T]he federal statutory provision must be completely free from ambiguity on its face, and must operate independently of the rest of the statute."[1]

The obligation of State courts in preemption cases like the present one, where Congress has on the face of the statute preempted State action, does not extend beyond looking at the plain language of the federal statute. By contrast, all the cases upon which the lower court relied to justify a "pragmatic" approach involved situations where Congress had been silent and where courts were required to reconcile potentially conflicting State and federal statutory schemes. (J.S. 23a). This is the teaching of *Aloha Airlines, Inc. v. Director of Taxation*, 104 S. Ct. 291, 294 & n.5 (1983), which was called to the New Jersey

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[1] Compare the holding of the New Jersey Supreme Court below:

"[C]ourts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible. 'Pre-emption of state law by federal statute is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained," ' " (Jurisdictional Statement, J.S. 23a) (citations omitted).

"The pertinent language of section 114(c) . . . may appear to be clear *language* at first glance, but we can hardly conclude that it conveys a clear and unambiguous *meaning* in light of the purpose and spirit of Superfund as a whole. We are reminded of Judge Learned Hand's ubiquitous observation of some 40 years ago:

> There is no surer way to misread any document that to read it literally***."

Id. at 24a (emphasis in original).

Supreme Court's attention by appellants but studiously ignored below.

* * *

New Jersey, like the court below, addresses appellants' statutory argument as though it turns entirely on the "plain meaning" of the term "may be compensated" as used in § 114(c) of Superfund, 42 U.S.C. § 9614(c). Playing upon the purported ambiguity of that term (N.J. Br. 14), the State argues that the phrase should be read as though it means "is actually compensated." In New Jersey's view, § 114(c) only preempts the creation of State spill funds that are used to pay for cleanups and other claims that are actually compensated by Superfund (N.J. Br. 20-21).

The meaning of the term "may be compensated" is, standing alone, sufficient to require a rejection of the "is actually compensated" reading embraced by New Jersey and the court below. While initially acknowledging that the phrase at issue in this case is "may be compensated" (connoting possibility), the New Jersey Supreme Court quickly turned its attention to an analysis of the word "may." (J.S. 24a-25a). In a line of cases dealing with the delegation of ministerial duties (in which the permissive "may" has been read as the mandatory "shall" to save the constitutionality of the particular delegation at issue), the New Jersey Supreme Court found support for its determination that the meaning of "may be compensated" in § 114(c) is unclear on its face. Once again, appellants contend that whatever ambiguity may attach to the word "may" in the context of ministerial delegation, there is no basis for reading a similar ambiguity into the very different phrase "may be."

Appellants' argument, however, does not stand merely upon the "plain meaning" of the term "may be compensated." Instead, it rests upon the much broader premise that § 114(c) must be construed so as to have some meaning, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), whereas New Jersey's construction renders § 114(c) virtually meaningless and comports with the holding of the New Jersey Supreme Court that "[t]he underlying intent of Superfund, as well as the legislative

history, mandates a conclusion of *no preemption*" (J.S. 36a) (emphasis added).

The preceding section of Superfund, § 114(c), 42 U.S.C. § 9614(b), provides that: "[a]ny person who receives compensation . . . pursuant to [Superfund] shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law." It is this section of the Act which guards against the danger of duplicate compensation. New Jersey's interpretation of § 114(c)—that it merely prevents State fund compensation of that which is actually compensated by Superfund—thus renders the section superfluous.

Moreover, § 114(c) provides that, although States are preempted from requiring a limited class of taxpayers, such as those who bear the burden of Superfund, to contribute to a fund whose purpose is to pay costs, damages or claims "which may be compensated under" Superfund, "[n]othing in this section shall preclude any State from using general revenues for such a fund. . . ." Thus, Congress envisioned that there could be some expenditures funded by general revenues for these purposes. But if New Jersey's "actual compensation" approach is accepted, no such funds from whatever source could ever be tapped, since § 114(b) prohibits the double compensation which the State claims is the only evil at which § 114(c) is aimed.

Finally, Congress found it necessary in § 114(c) to make it explicit that:

> Nothing in this section shall preclude any State from . . . imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

This disclaimer as to the scope of the preemption clause also has no meaning if New Jersey's view of the matter is adopted. Unless Congress intended § 114(c) to broadly preempt taxes or fees upon particular persons or substances to pay cleanup claims,

there was no reason for it to make clear that such special taxes or fees could be used for this limited purpose.

Had the New Jersey Supreme Court followed *Aloha Airlines*, it would have been forced to deal with the statute as Congress wrote it, rather than search for a "pragmatic" result that purported to reconcile the New Jersey and federal taxing schemes but, in fact, restructured the funding mechanism established by Congress for hazardous waste cleanup throughout the nation.

* * *

New Jersey, again like the court below, places heavy reliance upon a small, edited portion of the exchange between Senators Bradley and Randolph on the Senate floor regarding the scope of the preemption clause. Senator Randolph's initial description of the scope of § 114(c) is consistent with the view of the statute which appellants have taken:

> [i]t is not a prohibition on the uses that a State may make of its money nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase or pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

(N.J. Br. 6). However, in the course of giving brief answers to a set of prepared questions asked by Senator Bradley of New Jersey, Senator Randolph then offered a view of the statute that has been used by the State to support its position, *id.* at 6-7, by taking it out of context.[2]

This brief exchange between the two Senators is a very tenuous ground upon which to rest construction of the statute, particularly when it renders the preemption provision meaningless.

[2] The State chose to omit the next sentence of Randolph's reply: "Thus, the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund and the fund is for the purpose of paying oil spill damage claims." (Superfund does not cover cleanup of oil spills). Also omitted is an immediate earlier reference by Senator Randolph to the 180 day period before preemption became effective (preemption under Superfund took place immediately upon enactment of the statute).

As this Court has held, legislative debates "are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body" because they are merely "expressive of the views and motives of the individual members." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). *See also* 2A Sutherland, *Statutory Construction* § 48.13 (4th ed. 1973). In fact, the overwhelming weight of the legislative history of Superfund and its predecessor bills, including committee reports, support the plain meaning of § 114(c) urged by appellants.

It is clear from the language of Superfund that one of the concerns of Congress in enacting the statute, and imposing an excise tax thereunder, was the effect such levy would have on the ability of the taxed products to be competitive with the products of foreign nations, 42 U.S.C. § 9651. Additionally, Congress was concerned with the burden that existing and possible future state funds would place on interstate and international trade involving these products. This was specifically recognized by Senator Cannon, the actual sponsor of § 114(c), in the Senate debate at the time of the passage of Superfund, when he stated:

> We are extremely pleased that this matter has been worked out. I strongly support the goal of making our environment safer from pollution by hazardous substances, but this goal must be carried out carefully in order not to have unintended and potentially disastrous impacts on the commerce of this country. It is for that reason we drafted and submitted amendments responding to concerns raised in Commerce Committee hearings.

126 Cong. Rec. 14981-82 (daily ed. Nov. 24, 1980).

One of the amendments the Senator was referring to provided the basis for § 114(c). It brought S 1480, the Senate predecessor of Superfund, into conformity with HR 85, the House version, with regard to preemption of duplicative state taxes. The explanation accompanying Senator Cannon's preemption amendment clearly indicates that its purpose was to prevent States from burdening interstate commerce with the cost of overlapping and duplicative spill tax systems. It was concluded that without preemption of such state taxing authority, interstate transporters would face the uncertainty of being subjected to differing requirements in every state. This congressional

determination, as expressed in § 114(c), was clearly within the power granted to Congress under the Commerce Clause. *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 150 (1979).

The EPA guidance memorandum cited by the State offers even more treacherous ground for embracing a construction of the statute which robs the preemption provision of any meaning. First of all, the language of this document is totally ambiguous, providing little or no aid in interpreting the statute. While EPA has been given very substantial responsibilities to implement Superfund, it has neither the authority nor incentive to protect Congress' purpose to spare the small group of taxpayers focused upon by federal Superfund from being subjected to similar special taxes in the states. To the contrary, EPA's interest is in finding financial support for site clean-up from all possible sources and it is not likely to be sensitive to such congressional concerns.

As was pointed out in appellants' jurisdictional statement, resort to post-hoc statements of legislative committees years after passage of the legislation under scrutiny never constitutes a sound basis upon which to construe a statute. (J.S. at 14). *A fortiori*, it should not be relied upon to rob the earlier statute of all possible meaning.

* * *

Finally, in a footnote at pp. 10-11 of its brief, the State asserts that New Jersey has administered the Spill Fund in a manner consistent with the New Jersey Supreme Court's ruling. The State goes on to assert that Superfund proceeds have been spent to finance personnel, equipment and administration costs, the State's matching share on Superfund-covered sites, and cleanups where no federal funding is available. Initially it must be recognized that this entire contention is irrelevant, because § 114(c) prohibits taxing, not spending. However, the appellants bring to the Court's attention evidence in the record below which belies the State's assertion that there is no actual conflict between the New Jersey and federal spending schemes and that New Jersey has expended no revenues from its Spill Fund on items covered by Superfund.

Stipulated facts before the Tax Court at the time of the original summary judgment motions in this case demonstrated that out of $33,000,000 spent from the Spill Fund since its inception, $31,000,000 was spent on the cleanup of chemical substances. Only $470,000 was spent on the cleanup of petroleum spills. Records produced subsequent to the Tax Court's decision indicate that during the period from January 1, 1981 through June, 1983, in excess of $18 million was expended by New Jersey from its Spill Fund on chemical site cleanups. Of this amount, more than $15 million dollars was spent on Superfund-covered sites on the National Priority List, none of which has been rejected for financing.[3] The same records indicate that approximately $1 million was spent on the State's matching share at Superfund sites. Therefore, less than two million dollars, or 11% of Spill Fund expenditures, was spent on sites not covered by Superfund. Conversely, almost 84% of Spill Fund expenditures was used at Superfund sites.[4] These expenditures directly contradict the State's own assertion that the preemption test it uses for Spill Fund expenditures is whether the site is on the National Priority List or, if included, rejected for financing. (N.J. Br. 20).

The position of the State has always been that it is not restricted in any way by § 114(c), in either taxing for or spending funds from the New Jersey Spill Fund. This position was set forth in the letter from the Director of Taxation in July, 1981, a copy of which was attached to plaintiffs' initial complaint, and has never been retracted.

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[3] This evidence was produced by New Jersey in response to requests for discovery in this suit and included in affidavits submitted by appellants in support of motions before the Tax Court.

[4] During this period, just under $89,000 was expended on petroleum spills.

CONCLUSION

The decision of the New Jersey Supreme Court below should be summarily reversed or, in the alternative, this Appeal should be accorded plenary review.

Respectfully submitted,

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